

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–2022)

EMERGENCY MOTION FOR REDACTION OF RESTRICTED
INFORMATION

Music Choice hereby files this Emergency Motion for Redaction of Restricted Information in response to the improper disclosure of its confidential and commercially sensitive information in the Copyright Royalty Judge’s *Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing and Denying Music Choice’s Motion for Rehearing – RESTRICTED*, 16-CRB-0001-SR/PSSR (2018-2022) (April 17, 2018) (the “Order”) and [*Corrected*] *Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing and Denying Music Choice’s Motion for Rehearing – PUBLIC*, 16-CRB-0001-SR/PSSR (2018-2022) (April 17, 2018) (the “Public Order”).

The Order and the Public Order contain information designated as a “Restricted” under the terms of the Copyright Royalty Judge’s Order dated June 15, 2016 (the “Protective Order”). Specifically, page 15 of both the Order and Public Order discloses confidential data derived from Music Choice’s internal market research (the “Restricted Information”), which information is

proprietary, not known to the public, kept confidential by Music Choice, and the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties. This Restricted Information comes from designated Trial Exhibit No. 443, which was produced as a Restricted document during the proceeding. However, despite the designation of this document and its contents as “Restricted” pursuant to the Protective Order, the information derived from that document was neither identified as Restricted in the Order nor redacted in the Public Order. Moreover, the Public Order was issued without the Judges following their past procedure of allowing the participants a short time to verify that all Restricted information was properly redacted.

Music Choice has demarcated the Restricted Information in Attachment A hereto, and respectfully requests that both the Order and the Public Order immediately be removed from the eCRB filing portal, and from any other publically available platform, until such time as Music Choice’s Restricted Information have been identified in the Order, and appropriate redactions of that Restricted Information have been applied to the Public Order.

This Motion is filed after conferring with the other participants in the above-captioned proceeding, who have confirmed through counsel that they will not object to this Motion.

Dated: April 18, 2018

Respectfully submitted,

/s/ Paul Fakler

Paul M. Fakler (NY Bar No. 2940435)

Eric Roman (NY Bar No. 2827657)

Margaret Wheeler-Frothingham

(NY Bar No. 5281191)

ORRICK, HERRINGTON & SUTCLIFFE LLP

51 West 52nd Street

New York, New York 10019

Telephone: (212) 506-5000

Facsimile: (212) 506-5151

pfakler@orrick.com

eroman@orrick.com

mwheeler-frothingham@orrick.com

Counsel to Music Choice

Attachment A

Music Choice's Proposed Additional Redactions to Portions of
the Judges' April 17, 2018 Orders

integrating those channels with social media providers such as Facebook and Twitter, Music Choice is allowing consumption in a different manner, and providing a different user experience from its residential audio cable television service. Music Choice does so by utilizing technological capabilities only available with the advent of the Internet and the wireless capabilities that it allows, which are not the type of pre-July 31, 1998 investments Congress sought to protect when it adopted the grandfathered rate provisions for PSS.

Consistent with the Register's Opinion, the Judges conclude that a Music Choice channel available to a subscriber outside the home (*e.g.*, through a smart phone, tablet, or other mobile device) is part of a different service offering. This conclusion is consistent with evidence in the record dealing with the way in which Music Choice customers consume Music Choice services. Notably, [REDACTED] viewers watch (or listen to) Music Choice channels on their TVs and in their own homes. Music Choice Viewership Study, Trial Ex. 443, at 31. In Q3 2016, however, [REDACTED] of viewers stated that they also typically watch (or listen) at work, [REDACTED] in a school dorm, and [REDACTED] in a car. *Id.* Television was still the most used device for viewing (or listening), but [REDACTED] (in Q3 2016) also indicated watching (or listening) online, and [REDACTED] on cell phones. *Id.*

These emerging consumption patterns strongly suggest that a PSS channel that offers users the capability to consume that service outside the home will likely alter their traditional consumption patterns in a way that makes those channels part of a different service, which is outside the scope of the PSS license. The fact that Music Choice offers (at least) 25 music channels that are only available outside its residential television audio service indicates that Music Choice was not merely intending to replicate that residential television service offering over the Internet. Opening the service to the Internet allows an opportunity to offer new channels, new genres, and new formats, unfettered by limitations on the number of channels a cable system is willing to dedicate to the service. These facts support the conclusion that the service is a different service rather than a mere expansion of the existing service.²²

Finally, Music Choice argues that the Judges' decision on this issue would create a manifest injustice because, according to Music Choice, it cannot track individual performances and therefore would not be able to comply with existing webcasting royalty requirements. MC Motion at 9. This assertion is undercut by Music Choice's CEO who clarified that it is not technologically impossible to know how many listeners are listening to each performance on Music Choice's Internet transmissions; rather that Music Choice chooses not to track those performances because it believes it would be prohibitively expensive to do so. 5/18/17 Tr. 4651, 4652 (Del Beccaro).

Music Choice also argues that ceasing to provide its Internet streaming service would cause Music Choice to breach its affiliate agreements and therefore would cause market

²² According to Music Choice, each channel offers a distinct musical genre or sub-genre. Trial Ex. 55, at 4 (Del Beccaro WDT). Music Choice channels offered over the Internet through a web site or app would also offer video on demand, which is beyond the scope of the PSS service. Trial Ex. 57, at 29 (Del Beccaro WRT). The Judges agree with SoundExchange's assessment that "[t]here is little or no relationship between Music Choice's current Internet service and its pre-1998 investments in the PSS cable radio service." SoundExchange Opposition at 6. Music Choice did not begin providing any video-on-demand until 2004. Trial Ex. 55, at 28 (Del Beccaro WDT). Music Choice began providing access to its service through personal computers, a precursor to mobile devices and apps, in 2004 or 2005. Trial Ex. 926.

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Docket No. 16–CRB–0001–SR/PSSR (2018–2022)

DECLARATION AND RULE 11 CERTIFICATION OF

PAUL M. FAKLER

I, PAUL M. FAKLER, declare

1. I am a partner with Orrick, Herrington & Sutcliffe LLP, counsel to Music Choice in the above-captioned proceeding. I am authorized by Music Choice to submit this declaration on its behalf.

2. Pursuant to 37 C.F.R. § 350.4(e)(1) and the Copyright Royalty Judge’s Order dated June 15, 2016 (the “Protective Order”), Music Choice, through its undersigned counsel, respectfully submits this declaration, Rule 11 Certification and accompanying Redaction Log concerning Protected Material, as that term is used and defined in the Protective Order.

3. This declaration, Rule 11 Certification, and Redaction Log is submitted simultaneously with Music Choice’s Emergency Motion for Redaction of Restricted

Information (the “Motion”), filed in response to the Copyright Royalty Judge’s *Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing and Denying Music Choice’s Motion for Rehearing – RESTRICTED*, 16-CRB-0001-SR/PSSR (2018-2022) (April 17, 2018) (the “Order”) and [*Corrected*] *Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing and Denying Music Choice’s Motion for Rehearing – PUBLIC*, 16-CRB-0001-SR/PSSR (2018-2022) (April 17, 2018) (the “Public Order”).

4. I have reviewed the Motion, the Redaction Log, the Order, and the Public Order. I have also reviewed the terms of the Protective Order.

5. As discussed below, after consulting with Music Choice and other attorneys working on this matter, I have determined that portions of the Order and the Initial Order, which pertain to Preexisting Subscription Services (“PSS”) and Music Choice, contain Protected Material that should be treated as confidential under the Protective Order.

6. Such Protected Material includes confidential and material business information that is proprietary, not available to the public, and commercially sensitive. Specifically, the additional proposed redacted material is confidential data derived from Music Choice’s internal market research. This information is proprietary, not known to the public, maintained as confidential by Music Choice, and the disclosure of this information would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.

7. All of the information in the proposed additional redactions was produced in the proceeding as Restricted under the Protective Order.

8. Within the Redaction Log, each listing of a redaction identifies the page and line number of each proposed redaction, and a brief description of the nature of the redacted Protected Material.

9. I have reviewed the redactions set forth in the Redaction Log and to the best of my knowledge, information and belief, the redacted information meets the definition of Protected Material contained in the Protective Order. At the time this declaration is made, good cause exists for the treatment of the information as Protected Material in order to prevent certain business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Music Choice to provide the Copyright Royalty Judges with the most complete record possible on which to base its determination in this proceeding.

Pursuant to 28 U.S.C. §1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: April 18, 2018

Respectfully submitted,

/s/ Paul Fakler

Paul M. Fakler (NY Bar No. 2940435)

Eric Roman (NY Bar No. 2827657)

Margaret Wheeler-Frothingham

(NY Bar No. 5281191)

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**MUSIC CHOICE’S REDACTION LOG IN SUPPORT OF ITS
EMERGENCY MOTION FOR REDACTION
OF RESTRICTED INFORMATION**

Page/Line Number(s)	DESCRIPTION
Page 15, line 11	Confidential data derived from Music Choice’s internal market research, the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.
Page 15, line 12	Confidential data derived from Music Choice’s internal market research, the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.
Page 15, line 13	Confidential data derived from Music Choice’s internal market research, the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.
Page 15, line 14	Confidential data derived from Music Choice’s internal market research, the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.
Page 15, line 15	Confidential data derived from Music Choice’s internal market research, the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.

Dated: April 18, 2018

Respectfully submitted,

/s/ Paul Fakler

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mwheeler-frothingham@orrick.com

Counsel to Music Choice

Certificate of Service

I hereby certify that on Wednesday, April 18, 2018 I provided a true and correct copy of the Motion to the following:

Sirius XM, represented by Todd Larson served via Electronic Service at todd.larson@weil.com

SAG-AFTRA, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Johnson, George, represented by George D Johnson served via Electronic Service at george@georgejohnson.com

Warner Music Group, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

American Federation of Musicians of the United Sta, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

SoundExchange, Inc., represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Recording Industry Association of America, The, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Signed: /s/ Paul Fakler